85-1336

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

FREDERICK J. WALSH, CHIEF OF POLICE
OF ORLANDO, FLORIDA, PETITIONER

v.

CENTRAL FLORIDA NUCLEAR FREEZE CAMPAIGN
AND BRUCE GAGNON

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

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Opinions Below

The opinion of the court of appeals (Pet. App. A) is reported at 774 F.2d 1515. The opinion of the district court (Pet. App. B) is unpublished.

Jurisdiction

The judgment of the court of appeals was entered on November 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional Provision and Ordinances Involved

This case involves interpretation of the First Amendment to the United States Constitution and Chapter 18A of the municipal ordinances of the City of Orlando. The text of these

provisions are set forth in the Appendix (Pet. App. C, D).

Statement

Respondent Central Florida Nuclear Freeze Campaign applied to the City of Orlando for a permit to conduct a parade and rally. The City of Orlando advised Respondents that incidental to obtaining a permit they would have to pay the actual cost of providing police services for the events. Respondents filed a complaint in the U. S. District Court for the Middle District of Florida seeking declaratory and injunctive relief preventing the City from charging police costs and declaring the relevant City Code section, 18A.12, unconstitutional. (R. Vol. 1,1-6).

On cross motions for summary

judgment, the District Court entered judgment for the City of Orlando (Pet. App. B). Respondents appealed to the Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. 1291. The Court of Appeals reversed the district court and held the relevant city code section unconstitutional (Pet. App. A).

The City of Orlando Code, Chapter 18A (R. Vol. 1, 38-47, Pet. App. D), requires the issuance of an outdoor public assembly permit for any rally or demonstration calculated to attract over 100 people, as well as for any parade. Any peaceful picketing which is conducted off the City streets in a manner that will not obstruct vehicular or pedestrian

traffic is wholly and specifically exempted from the permit requirements (Section 18A.10(2)(d),Pet. App. D.) Persons, however, who wish to parade or picket in a manner that will block or obstruct ordinary traffic must pay a filing fee to cover the processing expenses at the time the application is submitted. In addition, fees for the use of any City property or City services must be paid prior to the issuance of the permit. (Section 18A.11(3), Pet. App. D). If, based upon the size, location and nature of the assembly, the Chief of Police determines that additional police protection will be necessary for purposes of traffic and crowd control, Section 18A.12 of the Code requires the

applicant to prepay the expenses of police protection. An applicant denied a permit may appeal to City Council or may accept an alternative permit authorizing the conduct of the activity on a date, at a time, over a route or in a location different from that named in the original application. (Sections 18A.15 and 18A.16, Pet. App. D).

The Central Florida Nuclear Freeze Campaign applied to the City of Orlando for permits to hold a 9-hour rally and a 4-mile parade on major business thoroughfares in the City. The Chief of Police approved issuance of the permits, conditioned on the payment of $233.10 for police protection during the rally and $1,202.64 for police services during the parade.

The need for extra police services was based upon the applicant's representations that approximately 1,000 persons would gather for 9 hours at the rally and 700 to 800 people would march for 2 1/2 hours traveling on and across major traffic thoroughfares. (R. Vol. 1, 56-61, 143-144).

The parties thereafter entered into a stipulated agreement pursuant to which the Central Florida Nuclear Freeze Campaign paid the permit fee to the City to hold in escrow pending the outcome of this case, obtained approval for, and held its events.
(R. Vol. 1, 72-73).

Argument

1. In Cox v. New Hampshire, 312

U.S. 569 (1941), this Court reviewed a licensing and permit scheme designed by the State of New Hampshire which, similar to the ordinances at issue in this case, required persons wishing to use the public streets for a particular event to pay a fee reasonably fixed to cover costs incurred to police the event. The New Hampshire statute allowed the imposition of fees of up to $300, a considerable sum in 1941, based on the length and nature of the event.

The City of Orlando Code, like the New Hampshire statute, requires groups wishing to stage certain types of events to prepay the actual costs of law enforcement services necessary to police the event. Importantly, however, the City also provides ample

alternative means for groups to exercise their first amendment rights free of charge. The City exempts entirely from the licensing and permit requirements groups assembling indoors, groups of up to 100 persons assembling out of doors in a single location and groups of any number whatsoever who march or picket on the city sidewalks in a manner that does not block or obstruct other pedestrian or vehicular traffic.[1] Groups that, on the other hand, insist on exercising their first amendment rights in an extraordinary and particularly onerous fashion by holding a continuous parade through busy

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[1] See Sections 18A 01(7) and 18A.10(2)(d) of the City Code (Pet. App. D).

downtown thoroughfares, blocking ordinary traffic and restricting the normal public use of the streets and sidewalks, are required to pay the actual costs of police services that their event necessitates.

The court of appeals (Pet. App. A-43a) found this requirement unconstitutional, holding that:

> Although license fees are proper for the costs of administering an event, under the Supreme Court's decision in Cox v. New Hampshire, we read Cox as authorizing only nominal charges for the use of the city streets and parks to further First Amendment activities. An ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment.

As the concurring opinion points out, (Pet. App. A-66a) however:

> . . .the majority misreads Cox v. New Hampshire as permitting only nominal charges for policing a demonstration in a public area. The fee approved in Cox was not nominal, but instead ranged "from $300 to a nominal amount."

The issue of whether a government can charge demonstrators the actual costs of the police services required by their event is one of significant importance to all municipalities and county governments. Local law enforcement is charged with the responsibility for controlling traffic on the public streets and protecting the public safety. See Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 650 (1981).

Parades, such as the event at issue in this case, whereby hundreds of

marchers move for 2 1/2 hours through numerous city blocks in a busy downtown business section, blocking intersections and interrupting the orderly flow of both pedestrian and vehicular traffic, necessitate legitimate governmental concern and involvement. As this Court has so succinctly stated,

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets in a clear example of governmental responsibility to insure this necessary order.

Cox v. Louisiana, 379 U.S. 536, 554 (1965). Local governments should not be forced into bearing the costs of expensive police services required for every group that wishes to cloak itself under the rubric of free speech and disrupt the ordinary use of public thoroughfares. Taxpayers must not be required to foot the bill for groups, which although provided ample alternative means to express their views, choose to do so in a particularly burdensome manner. Ordinances such as the one at issue in this case, which allow local governments to charge such groups for the actual costs of policing these extraordinary events, are fair both for the taxpaying citizens of the

community and to the groups themselves.[2]

In Petitioner's view, the prior decisions of this Court support the constitutionality of a regulatory

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[2] Significantly, a municipality is not required to allow persons to parade though the city streets in a manner which requires the blocking of intersections and the disruption of traffic.

> "Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street or entrance to a public or private building and allow no one to pass who did not agree to listen to their exhortations."

Cox v. Louisiana, 379 U.S. 536, 554-555 (1965). Instead of denying groups the privilege to march as they desire, however, the City of Orlando has simply passed on the additional costs this type of activity requires. This enhances rather than restricts free speech interests by providing additional forums without burdening the ordinary taxpayer.

scheme which passes along the actual costs of police protection to persons staging a downtown parade. As the majority opinion in the court of appeals indicates, however, more than forty years have passed (including significant evolution in first amendment jurisprudence) since this Court has addressed this issue, and the one case directly on point, Cox v. New Hampshire, supra, left many questions unanswered. Referring to Cox, the majority opinion (Pet. App. A-35a) points out that:

> ...the Court did not touch on the reasonableness of the fees or how they could be fixed. Thus, important questions still remain about the application of Cox under modern constitutional doctrine. Importantly, the Cox Court did not address circumstances where persons who wish to demonstrate are unable to pay the required fee, nor did the Court concern itself with a statute which is unlimited in the amount of fees

that can be charged as expenses, nor with the questions whether the charge can be based, at least partially on the content of the speech.

Since Cox was decided in 1941, there has been no clarification from this Court on the issue of fees for police services. A municipality wishing to draft an ordinance imposing constitutionally permissible fees has no clear precedent on which to rely. The issue is, moreover, one on which the the lower courts are sorely in need of this Court's guidance.[3] In addition to the instant case, Petitioner is aware of at least one other case directly on

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[3] See Goldberger, A Reconsideration of Cox v. New Hampshire: Can Demonstrators be Required to Pay the Costs of Using America's Public Forums? 62 Texas L. Rev. 403 (1983).

point, Stonewall Union v. City of Columbus, Case No. C-2-85-849 (S.D. Ohio, June 20, 1985), presently pending in the Court of Appeals for the Sixth Circuit. Other federal courts have recently been faced with resolving similar issues concerning administrative fees. See, e.g., Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666 (11th Cir. 1984); Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050 (2nd Cir. 1983); Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978); Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976); Streich v. Pennsylvania Commission on Charitable Organizations, 579 F. Supp. 172 (M.D. Pa. 1984); Bayside Enterprises, Inc. v. Carson,

470 F. Supp. 1140 (M.D. Pa. 1984).

There is a compelling need for this court to grant certiorari in this case to end the confusion over the law in this area and give local governments solid guidance on permissible charges for first amendment related activities.

2. The City of Orlando ordinances governing fees associated with outdoor public assemblies are reasonable, fair, and non-discrimin- and therefore constitutionally permissible. Without question, municipal restrictions which have operated to deny parties the opportunity to speak on a certain topic have been subject to close scrutiny and often held unconstitutional. See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Cox

v. Louisiana, supra.; Hague v. Committee for Industrial Organization 307 U.S. 496 (1939). The City of Orlando ordinance under attack in this case, however, denies no one the right to express his or her views. Rather, the ordinance simply passes along the cost of policing the event and protecting the public safety should the group insist on sponsoring an event which blocks public thoroughfares. The group staging such an event is required to pay only the actual salaries of the officers policing the gathering.[4] The fees are

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[4] Although the court of appeals found fault with the ordinance in that it did not require elaborate means of seeking the least expensive officers or methods to provide free services to indigents, "the First Amendment does not guarantee a right to the least expensive means of expression." Gannett Satellite Information Network v. Metropolitan Transportation Authority, 745 F.2d 767, 774 (2d Cir. 1984).

determined by the Chief of Police based on the number of officers necessary for traffic and crowd control based on the size, location and nature of the assembly (City Code s. 18A.12, Pet. App. D).

Although the ordinance permits the Chief of Police to consider the "nature" of the event in assessing the number of officers required, this methodology is entirely consistent with the scheme upheld in Cox v. New Hampshire, supra, at 577. ("We perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.").

The language of the ordinance simply permits the Chief of Police to consider the totality of circumstances in determining the need for police services. It does not render the ordinance unconstitutionally content-based. In Clark v. Community for Creative Non-Violence, 104 S.Ct. 3065 (1984), this Court held that a regulation is content-neutral and therefore constitutionally permissible so long as it is "not being applied because of disagreement with the message presented." In other words, an ordinance is content-neutral in the constitutional sense if it is applied evenhandedly and one group's viewpoint is not preferred at the expense of another's. Heffron, supra at 649; White House Vigil for the ERA Committee v.

Clark, 746 F.2d 1518, 1527 (D.C. Cir. 1984).

There is nothing in the record of this case to indicate that the City ordinance was imposed in such a way as to favor one group over another because the City disagreed with the viewpoint expressed. Content-neutral considerations based on the controversial nature of the topic, regardless of which side of the issue is to be addressed, are clearly relevant to the legitimate public safety concerns of the Chief of Police and are directly related to the governmental interest in protecting property and persons. The inclusion of these factors has no relation to the agreement or disagreement of the municipality with the ideology of a particular group. In

the interest of public safety, the municipality should not be restricted from considering the nature of the event when determining the level of police protection necessary. The ordinance at issue in this case fairly allows the municipality to take all relevant factors into account, a sound practice that should withstand constitutional challenge.

Conclusion

The ability of local governments that provide ample alternative means for the exercise of free speech to charge the costs of police services to those groups insisting on exercising those rights by parading through downtown streets and sidewalks is of significant importance to cities, counties and

local taxpayers across the country. It is an issue that this Court has not addressed in over forty years and which raises an important question of federal law which is greatly in need of interpretation and clarification. The City of Orlando ordinances require fees for police services at certain outdoor public assemblies which disrupt the ordinary flow of pedestrian and vehicular traffic. These fees are reasonable, fair and non-discriminatory and should be upheld as constitutionally permissible.

Respectfully submitted,

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APPENDIX A

OPINION, COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

(Opinion Retyped as Published*)

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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

CENTRAL FLORIDA NUCLEAR FREEZE CAMPAIGN and Bruce Gagnon, Plaintiffs-Appellants,

v.

Frederick J. WALSH, Chief of Police of Orlando, Florida, Defendant-Appellee.

No. 84-3833.

United States Court of Appeals, Eleventh Circuit

Nov. 4, 1985.

Nonprofit antinuclear organization brought action challenging constitutionality of city ordinance which required persons wishing to demonstrate in city streets and parks to prepay amount of costs for additional police protection determined by discretion of chief of police. The United States District Court for the Middle District of Florida, Reed, J., granted summary judgment for defendants, holding the

ordinance constitutional. Antinuclear organization appealed. The Court of Appeals, Tuttle, Senior Circuit Judge, held that the ordinance, on its face, as well as in manner in which it was applied, violated First Amendment guarantees of freedom of speech and assembly.

Reversed and remanded.

Albert J. Henderson, Circuit Judge, filed concurring opinion.

1. Constitutional Law 90.1(4),91

City ordinance which required persons wishing to demonstrate in city streets and parks to prepay amount of costs for additional police protection as determined by discretion of chief of police facially

violated First Amendment rights of speech and assembly. U.S.C.A. Const.Amends. 1, 14.

2. Constitutional Law 234.5

City ordinance which required persons wishing to demonstrate in city streets and parks to prepay amount of costs for additional police protection as determined by discretion of chief of police denied indigent persons who wished to exercise their First Amendment rights of speech and assembly, but who were unable to pay such costs, an equal opportunity to be heard, thus rendering the ordinance unconstitutional. U.S.C.A. Const. Amends. 1, 14.

3. Constitutional Law 90.1(4)

City ordinance which requires persons wishing to demonstrate in city streets and parks to prepay amount of costs for additional police protection as determined by discretion of chief of police violated First Amendment guarantee of free speech to extent that fees charged to nonprofit antinuclear organization applying for permit under the ordinance were based upon content of the demonstrators' views. U.S.C.A. Const.Amends. 1, 14.

4. Constitutional Law 90.1(4)

Principle of "equality of expression", inherent in First Amendment, means that in context of public forum, government must

afford all points of view equal opportunity to be heard; it forbids content discrimination and denies government the power to determine which messages shall be heard and which suppressed. U.S.C.A. Const.Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law ..90.1(4), 91

City ordinance which required persons wishing to demonstrate in city streets and parks to prepay amount of costs for additional police protection as determined by discretion of chief of police failed to adequately protect First Amendment rights in

that it did not import objective and definite standards to guide licensing official in considering whether additional police protection reasonably would be required for assembly for purposes of traffic and crowd control, and left too much discretion in chief of police to determine whether additional costs for police protection were needed. U.S.C.A. Const.Amends. 1, 14.

6. Constitutional Law 90.1(4), 91

City's charging of overtime payment for police salaries in determining amount of fee charged under city ordinance which required persons wishing to demonstrate in city streets and parks to prepay amount of costs

for additional police protection was not the least restrictive means of achieving governmental concerns of protecting the public safety, and thus, failed to adequately protect First Amendment rights; use of state certified reserve officers or use of regular officers at nonovertime pay would have served to diminish restraints upon exercise of First Amendment rights. U.S.C.A. Const.Amends. 1,14.

7. Municipal Corporations 703(2)

City ordinance which required persons wishing to demonstrate in city streets and parks to prepay amount of costs for additional police protection as determined by discretion of chief of police was

unconstitutional for failure to provide for prompt judicial review of denial of permit. U.S.C.A. Const.Amends. 1, 14.

Appeal from the United States District Court for the Middle District of Florida.

Before HENDERSON AND CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This is an appeal of an order granting the defendants' motion for summary judgment, upholding an Orlando, Florida, ordinance which requires as a condition for the granting of a permit for persons wishing to use the public streets and parks for demonstrations, the prepayment of fees for additional police protection. For the

reasons set forth herein, the Orlando city ordinance on its face, as well as the manner in which it was applied violates the First Amendment guarantees of freedom of speech and assembly of the United States Constitution made applicable to the states by the due process clause of the Fourteenth Amendment.

I. BACKGROUND

The appellants, the Central Florida Nuclear Freeze Campaign, a non-profit antinuclear organization, and Bruce Gagnon, its coordinator, desired to conduct a parade and rally in Orlando, Florida on a Saturday in October, 1983 to communicate their views about the nuclear arms race. As required by

the Orlando City Ordinances, 18A.10-11,[1] the appellants filed an application for a permit with the Chief of Police of Orlando to conduct their outdoor march and rally. The application estimated that 1,000 people would participate in a nine-hour rally and approximately 700 to 800 marchers in a two and one-half hour parade. It is clear that the term "assembly" in the code applies to both parades and rallies. The proposed parade route covered approximately four miles through major thoroughfares and ending at "Tinker Field," an Orlando recreation area, where the rally would be conducted.

Before a permit can be issued, Section 18A.12[2] of the Orlando City Ordinance requires the Chief of Police to "determine

whether and to what extent additional police protection reasonably will be required for purpose of traffic and crowd control." In determining whether additional police protection is required, the Code requires the Chief of Police to consider such factors as the size, location and nature of the assembly and if additional police protection is then warranted, the applicant has the duty of prepaying the expenses as a condition of the issuance of the permit.

Pursuant to this Ordinance, the city determined that 18 additional officers would be needed to police the nuclear freeze march and three additional officers were needed to police the appellants' rally. The city based its decision on a number of factors

including its belief that due to the controversial nature of the rally and the location of the Martin Marietta plant, a major defense manufacturer and a large local employer in Orlando,[3] the potential for hostile counter activity existed which necessitated the need for additional police protection. The City's decision was also based on the expectation that the rally and parade would draw many non-local participants who, based on past police experience, the City concluded would be more likely to cause disorder than would local residents.[4] The cost of this additional police protection totaled $1,435.74 ($1,2022.64 to compensate police working the parade and $233.10 for the rally.) This

amount was computed on the basis of what it would cost to pay police officers to work off duty at the rate of one and one-half pay at the regular hourly rate by working on the day of the event which was a non-workday.[5] Because the event was to take place on Saturday, the fee charged to the appellant for payment of police protection was computed on this overtime pay basis.

Prior to the payment of this fee, the appellants filed a complaint in the United States District Court, seeking declaratory and injunctive relief against the enforcement of Section 18A.12 of the Orlando City Ordinance alleging that conditioning the exercise of First Amendment rights upon

the payment of a "substantial" and "unreasonable" fee placed an insurmountable burden on First Amendment's guarantee of freedom of speech and assembly and violated the equal protection component of the Fourteenth Amendment. The plaintiffs then moved for a preliminary injunction to require the issuance of the parade permit without payment of the fees.

The district court heard oral argument on the plaintiff's motion for a preliminary injunction and denied the injunction, relying on the Supreme Court's decision in Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1971). The parties thereafter entered into a stipulation that the plaintiff would pay the sum of $1,435.74

under protest, as pre-payment for City of Orlando police services in connection with the plaintiff's parade and rally. The fee was paid and the defendant granted the plaintiffs permission to conduct the parade and rally. Subsequently, the parties filed motions for summary judgment to resolve the constitutionality of the statute.

II. THE ISSUE

The parties stipulated that the issue "to be determined was whether the city's ordinance requiring the payment of a fee for additional police services violate the First Amendment on its face or as applied in this case."

III. DISCUSSION

In the City's motion for summary judgment, the defendant claimed that the requirements of Orlando City Code Section 18A.12 requiring the payment of a fee to defray the costs of policing the event was constitutional under the Supreme Court's ruling in Cox v. New Hampshire.[6] Moreover, the defendant asserted that the ordinance was both reasonable and was related to legitimate government concerns as a valid time, place and manner restriction on the use of the public streets and that the license scheme in Cox is directly analogous to the ordinance scheme in the City of Orlando. It contends that the Orlando ordinance in question simply passes

along the actual costs of policing the event and protecting the public safety to the event participants.

The defendant suggests that the Court in Cox did not limit the permissible fee to $300.00 and that relative dollar values should therefore be considered when comparing the $300.00 fee approved in Cox with the fee charged in the case at hand.

According to the defendant, other cases have cited Cox in approving fees designed to defray the actual expenses of administering a First Amendment activity. It cites Collins v. Smith, 578 F.2d 1050, 1054 (2d Cir.1983) for citing Cox that government may impose financial burdens on the exercise of First Amendment rights when the amount

involved is reasonable and directly related to legitimate government purposes.

In addressing the question of requiring the plaintiffs to pay overtime costs for police protection, the defendant argued that the payment of overtime for all off-duty work was a reasonable way to insure that police will be able to work at public assemblies and that in this regard, it meets the Cox requirement that fees be reasonable and non-arbitrary.

The defendant also argued that it was not improper to consider the content of the speech in determining the level of police protection required. The consideration of whether an activity might create disorder was only one factor in assessing the police

protection costs. Moreover, the defendant asserted that the Orlando ordinance does not allow the denial of a permit because of a perceived potential for disorder. "That potential is simply one element of the assembly which is considered along with several other factors in assessing whether additional police protection is warranted."

Lastly, the defendant concluded that in light of the interest in public safety, the requirements of City Code 18A.12 are not only reasonable but necessary to ensure that all persons are provided equal access to public forums.

In the cross-motion for summary judgment the plaintiffs alleged that: (1) a city could not condition the exercise of First

Amendment rights upon payment of the full costs of additional police protection necessitated by the exercise of First Amendment rights and that costs charged must be narrowly tailored and reflect the least restrictive means of accomplishing the governmental purpose; (2) the Orlando ordinance was not applied in a content neutral narrowly tailored fashion, but in a manner which interfered with the plaintiff's First Amendment rights.

Specifically, the plaintiffs argue that the license fee charged for the police services was based partially on the content of the expression of the plaintiffs' views. As evidence to support this claim, the plaintiffs refer to the deposition of deputy

chief of police Frederick Walsh, who testified that in addition to the usual factors of traffic control and the size of the demonstration, the police were concerned with the possibilities of hostile counter demonstrators and the presence of out-of-town demonstrators.

It was the plaintiffs' contention that it was improper to force the plaintiffs to pay projected police costs of protecting themselves from being attacked by possible hostile counter demonstrators. To the extent that the fees charged the plaintiffs were based upon the hostile counter activity and based on the content of the plaintiffs' speech, the plaintiffs contended that "the Defendant charged them for the enjoyment of

a right granted by the Federal Constitution" and that no case standards for the proposition that a demonstrator must pay the police to protect enjoyment of First Amendment rights from violence. Moreover, the plaintiffs argued that the defendants' consideration of the controversial nature of the plaintiffs' speech in determining what costs would be charged for the protection of that speech, constituted an impermissible restriction on the expression of speech.

Lastly, the plaintiffs argued that the City's concern in assessing the costs for protection was not solely based on the need for public safety, but partly on the concern for protecting the public fisc. The plaintiffs introduced deposition testimony

of deputy chief Walsh who acknowledged that the City's concern was whether the general fund which subsidizes police services "to perform a certain function" should absorb costs or should it be absorbed by the people who are actually in the process of exercising their rights.[7] The plaintiffs contended that the City's initial concern of public safety and protecting the public fisc goes beyond the holding of Cox v. New Hampshire's concern of public safety. However, if protection of the public fisc is considered a legitimate governmental concern then the plaintiffs argued that the ordinance fails to achieve those objectives by the least restrictive means available. It fails to differentiate between commercial

speech and non-commercial speech and lumps together all expression without acknowledging the greater protection accorded to public issue expression. The plaintiffs argued that the City could have chosen the less restrictive means of pursuing its legitimate governmental interests by treating public issue communication as a part of its basic law enforcement duty and utilizing, whenever possible regular police officers at straight hourly rates or utilizing reserve officers not benefited by the time and half pay, which would have reduced the costs for policing the event substantially. Thus, the plaintiffs argued there were alternative means of achieving the City's governmental

concerns without charging public issue proponents the full costs of policing the event at the overtime rate of off-duty police officers.

The district court, without oral argument, entered a judgment for the City of Orlando holding the City ordinance to be facially valid and constitutionally applied. It rejected the plaintiffs' arguments that the decision to impose a fee for additional police protection was both content based and a prior restraint on the exercise of First Amendment freedoms. The district court stated that it was reasonable for the defendant to consider the ideas or policies being espoused by the license applicant in making a determination as to

the quantity and quality of police protection needed to ensure an orderly parade or rally. This information, the court concluded, "was relied on in an objective, non-discriminatory fashion which comported with both common sense and the Constitution." In rejecting the plaintiff's argument that consideration of possible hostile counter demonstration was forcing them to pay for the exercise of First Amendment rights, the court stated that "Chief Walsh properly and objectively considered the potential for counter demonstrations in calculating additional police requirements and the amount of the license fee was reasonably related to the expected costs."

The court also disagreed with the plaintiffs' argument that the Orlando ordinance lacked narrow, objective and definite standards and gave the chief of police unbridled discretion to grant or deny a permit under the Supreme Court's holding in Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). The district court noted that there were several provisions in the Orlando ordinance which limited the police chief's discretion so as to protect First Amendment rights. First, the Court interpreted the Orlando ordinance as implicitly requiring that fees charged as prepayment of certain reasonable costs expected to be created by the activity must bear a reasonable relationship to

anticipated costs. Secondly, the ordinance provided for an expedited appeal to the council of a decision of the chief of police to deny a permit. Such an appeal would permit summary review of any adverse action by the chief of police resulting in a denial of the permit. These provisions, the Court stated "sufficiently restrict and channel the police chief's discretion so as to protect First Amendment rights." Additionally, the Court disregarded the argument that fees charged cannot be based on the notion of protecting the public fisc. The Court read Cox to rest in part on that justification. "Where the public activities of a specific person or group generate abnormal requirements for public

protection to secure the right of the general public to order and safety, Cox allows the cost thereof to be passed on to those whose activities occasion it. Although the City could choose to absorb the costs of all speech activity, nothing in the Constitution requires it to do so. Cox, supra." Lastly, the court concluded that the doctrine of least restrictive means did not require the chief of police to utilize the least expensive way of providing the public protection. The defendant's decision to use active off-duty police, even at an overtime pay rate was not on its face a constitutional violation nor was it, in the Court's view, an unreasonable choice under the unique facts at hand.

IV. THE DECISION

The issue raised by this appeal concerns the constitutionality of the Orlando ordinance 18A.2 which authorizes the chief of police to charge persons exercising First Amendment rights, the full cost of additional police protection, as a condition to the granting of a permit. The crucial concern here is the extent of the right of the public to use the city streets and parks,which the Supreme Court has regarded as quintessential public forums, to exercise First Amendment activity, without the imposition of pecuniary burdens which allegedly go beyond a municipality's concern of legitimate governmental interests. The appellant essentially raises two arguments

with respect to the unconstitutionality of the Orlando ordinance: (1) a governmental entity may not charge a public issue commentator the full costs of all police services believed necessary for traffic and crowd control and for the protection of demonstrators from hostile citizens' attack; (2) if costs for additional police services can be passed on to First Amendment users of the public forum, then the Orlando ordinance fails to achieve that governmental purpose by the constitutional requirement of narrow, objective and definite standards and the least restrictive means of accomplishing the governmental purposes. Since the Orlando ordinance may not be applied in a content neutral way, nor in the least restrictive

manner, the ordinance is unconstitutional.

We begin with the question to what extent and under what circumstances costs for additional police protection may be passed on to those wishing to demonstrate in a public forum as a pre-condition to the granted of a permit. At the outset, we note that the Supreme Court in Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941), approved a New Hampshire statute that required demonstrators to first obtain a license permit and the payment of a fee, as a pre-condition to those wishing to use the public streets and sidewalks to demonstrate. A group of Jehovah's Witnesses who were convicted for parading without a permit, challenged the statute on

constitutional grounds as interferring with their First Amendment rights. In upholding the permit requirements, the court held that First Amendment rights were not threatened by a a law regulating the time, place and manner of conducting a parade on the streets. The Court then considered the fee requirements in a single paragraph of the opinion:

> There remain the question of license fees, which, as the [state supreme] court said, had a permissible range from $300 to a nominal amount. The court construed the Act as requiring "a reasonable fixing of the amount of the fee." "The charge", said the court, "for a circus parade or a celebration process of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession, to which the charge would be adjusted." The fee was held to be "not a revenue

> tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

312 U.S. at 576, 61 S.Ct. at 766. The Court therefore viewed the fee rquirement as charges to meet expenses incidental to the administration of the regulation and the costs of policing the event. Although the Court did uphold the fee requirement, it is important to note that the Court did not touch on the reasonableness of the fees or

how they could be fixed. Thus, important questions still remain about the application of Cox under modern constitutional doctrine. Importantly, the Cox Court did not address circumstances where persons who wish to demonstrate are unable to pay the required fee, nor did the Court concern itself with a statute which is unlimited in the amount of fees that can be charged as expenses, nor with the question whether the charge can be based, at least partially on the content of the speech.

However, two years after the Cox holding, the Supreme Court in Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292(1943), gave further clarification on the extent to which a municipality can

charge fees as a prerequisite to the exercise of First Amendment rights in a public forum. In Murdock, the Court invalidated a city ordinance which as construed and applied, required distributors of religious literature to pay a flat license fee as a prerequisite to conducting their activities. In rejecting the fee as a license tax on the exercise of First Amendment rights, Justice Douglas, writing for the Court stated: "It is a license tax--a flat fee imposed on the exercise of a privilege granted by the Bill of Rights. A State may not impose a charge for the enjoyment of a right granted by the Federal Constitution." 319 U.S. at 113, 63 S.Ct. at 875. Moreover, twice the Court observed

that the fees imposed under the Pennsylvania ordinance were not nominal fees imposed as a regulatory measure to defray the expenses of policing the activities in question. Referring to Cox, the Court stated: "And the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuse of solicitors. See Cox v. New Hampshire . . ." 319 U.S. at 116-17, 63 S.Ct. at 876. The Murdock ruling therefore indicates that Cox should be read as authorizing a municipality's charging of fees for the use of the public streets only when such fees are both nominal and related to the expenses incidental to the policing of the event.

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The Supreme Court has not heard a First Amendment service charge case since Murdock in 1943 and as a consequence, there has been no further guidance by the Court on the application of the Cox rationale to the modern free speech cases. Importantly, however, the court has adopted a broad view on the public's right to the use of the streets and parks as quintessential public forums to further freedom of expression. In Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) and United States v. Grace, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983),the Court reaffirmed the public's guaranteed access to streets and parks, as public forums for purposes of assembly, communicating thoughts between citizens and discussing public questions.

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In United States v. Grace, the Court, in guaranteeing the right of members of the public to picket on public sidewalks outside of the Supreme Court building, stated:

> "[P]ublic places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks are considered without more, to be "public forums." In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

461 U.S. at 177, 103 S.Ct. at 1706-07 (emphasis added).

There is no question here that the type

of speech engaged in by the appellants, demonstrating through the public streets and conducting an assembly on the issue of nuclear arms is the type of speech which is constitutionally protected in the highest order. As this Court has stated, "certain types of speech traditionally are accorded greater protection in our society by virtue of the fact that the speech goes to the heart of the Democratic process." Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir., 1983). The appellants' demonstration and march through the streets of the city of Orlando is "public issue speech which occupies the highest rung of the hierarchy of First Amendment values." Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75

CENT. FLA. NUCLEAR FREEZE CAMPAIGN v. WALSH L.Ed.2d 708 (1983). Moreover, the places in which the appellants sought to exercise their First Amendment rights, the streets and parks, were quintessential public forums, "where the rights of the state to limit expressive activity are sharply circumscribed." Hague v. CIO, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939).

Governmental limitations on the exercise of First Amendment rights in traditional public forums, are proper only when they are valid time, place and manner restrictions which are content-neutral, are narrowly tailored to serve significant governmental interests and leave open ample alternative channels of communication. See, United States v. Grace, 461 U.S. 171, 103 S.Ct.

1702, 75 L.Ed.2d. 736; Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666, 673 (11th Cir.1984).

[1] These limitations do not permit the imposition of unlimited charges for the costs of additional police protection based on the content of the speaker's views. Although license fees are proper for the costs of administering an event, under the Supreme Court's decision in Cox v. New Hampshire, we read Cox as authorizing only nominal charges for the use of city streets and parks to further First Amendment activities. An ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment. We, therefore, hold that the

Orlando City Ordinance 18A-12 which requires persons wishing to use city street and parks to demonstrate, to prepay an amount of costs for additional police protection determined by the discretion of the chief of police is unconstitutional.

Such unrestricted discretion fails to require consideration of the purpose of the speech--commercial speech such as a circus parade compared to public advocacy concerning a political and social issue as here. Nor does it take into account the ability to pay by the applicant of the permit. Instead of weighing these factors, the chief of police chose to consider that some of the demonstrators were non-residents of Orlando, thus putting a premium on the enjoyment of the right of public speech and

assembly on intrastate and interstate travelers.[8]

[2] Moreover, indigent persons who wish to exercise their First Amendment rights of speech and assembly and as a consequence of the added costs of police protection, are unable to pay such costs, are denied an equal opportunity to be heard. Although the Orlando permit scheme does provide for a review of a denial of a permit before the Orlando City Council, there is no provision in the ordinance which exempts those persons from paying the costs for additional police protection who are unable to pay. The granting of a license permit on the basis of the ability of persons wishing to use public streets and parks to demonstrate, to pay an

unfixed fee for police protection, without providing for an alternative means of exercising First Amendment rights, is unconstitutional. Cf. Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702. "Freedom of speech, freedom of press, freedom of religion are available to all, not merely to those who can pay their own way." Murdock v. Pennsylvania, 319 U.S. 105 at 111, 63 S.Ct. 870, at 874, 87 L.Ed. 1292.

In Lubin v. Panish, the Supreme Court invalidated a California statute which required candidates to pay a filing fee in order to have their names placed on the election ballot, without providing any alternative means of access to those who were unable to pay. The absence of

alternative means of gaining access to the ballot inevitably rendered the California election system exclusionary as to some aspirants. The payment of the filing fees was an absolute, not an alternative condition and the failure to meet the filing requirement disqualified a person from running for office. The California scheme therefore operated to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters. The Court held that in the absence of reasonable alternative means of ballot access, a state may not consistent with constitutional standards require from an indigent candidate filing fees he cannot

pay. 415 U.S. at 712, 94 S.Ct. at 1318.

Although Lubin concerned the right of access to the ballots of those candidates who were unable to pay the filing fees, we find that the same rationale should apply to the right of access to the streets for purposes of exercising First Amendment rights of freedom of speech. Although the record before us does not show that the appellants were unable to pay the costs of police protection, we are not bound by these considerations on reviewing the granting of a motion for summary judgment. The ordinance is attacked on facial constitutional grounds and the inability of some persons wishing to parade or demonstrate, who are unable to pay in

advance, the costs for police protection, renders this statute unconstitutional.

[3] Moreover, to the extent that the fees charged to the Central Florida Nuclear Freeze Campaign were based upon the content of the demonstrator's views, the City of Orlando charged the organizers of the march and rally for the enjoyment of a right guaranteed by the Federal Constitution. The right of free speech, exercised in a public forum, on issues of public concern, cannot be abridged by a governmental regulation which requires the speakers to prepay the costs of police protection, based on the content of the speaker's views. Murdock, supra. A function of speech in our society, as the Supreme Court has stated, is to

invite dispute. "It may indeed best serve its high purposes when in it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1979). The possibility of hostile counter demonstrators, as a reaction to the Central Florida Nuclear Freeze Demonstration and Rally, was considered by the deputy chief of police in assessing the amount of costs it would charge the appellants for the additional police protection in conducting their activities. Such an inquiry into the content of the speakers' views in determining how much police protection is needed and as a consequence, how much the

speakers would have to pay to voice their views, constitutes an impermissible price tag on the exercise of free speech based on the content of the speech. A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Murdock v. Pennsylvania, 319 U.S. 105, 113, 63 S.Ct. 870, 875, 87 L.Ed. 1292 (1943). It is clear that an ordinance which has the effect of conditioning the granting of a park permit based on the content of the speaker's view is unconstitutional. See Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 328, 95 L.Ed. 280 (1951). It is also clear, that in the case at hand, the defendant chief of police considered the effects of hostile counter demonstrators in assessing

the costs of police protection. In answers to the plaintiff's interrogatories, the defendant stated that in addition to considering traffic control and the size of the demonstration, considerations of police protection from hostile counter demonstrators were also given effect. The defendant stated: "Due to the conventional nature of the rally and the close location of the Martin Marietta plant in Orlando, the potential for hostile counter activity was considered." The deputy chief of police, Frederick Walsh, testified in his deposition that the Nuclear Freeze Campaign permit costs included subjective considerations of police protection from hostile counter activity and the presence of out-of-town

demonstrators.

The district court concluded that it was reasonable for the defendant to consider the ideas and policies being espoused by the license applicant and "that this information was relied on in an objective, non-discriminatory fashion which comported with both common sense and the Constitution."

[4] Although the presence of out-of-town demonstrators and the potential for hostile counter activity are proper factors to be considered in determining what level of police protection is needed for a public demonstration, we conclude that such factors cannot be considered in fixing the costs of protection to those asking to exercise their First Amendment rights. Otherwise, the

result would operate to charge more for speech which is unpopular or controversial, in the mind of a public official. This does not comport with the First Amendment principle of equality of expression under the Constitution. The principle of equality of expression, inherent in the First Amendment, means that in the context of a public forum, the government must afford all points of view an equal opportunity to be heard. It forbids content discrimination and denies the government the power to determine which messages shall be heard and which suppresssed. See Karst, Equality as a Central Principle in the First Amendment, 43 Chi.L.Rev. 20, 28 (1975-76). "Even a content neutral time, place and manner

restriction may have unequal effects on various types of messages [and] [t]he resulting inequality may be constitutionally unacceptable, whether or not the discrimination is intended."

The effect of the Orlando ordinance, as applied in the case at hand, is to charge more for First Amendment activity which may require more police protection than less controversial speech; such a result places an undue burden on speech which is constitutionally unacceptable.

Lastly, we turn to the district court's holding that the Orlando ordinance did not import unbridled discretion to the chief of police in deciding whether or not to grant a permit.

The appellants also attack the Orlando ordinance on the grounds that it lacked narrow objective and definite standards in determining whether to pass on the additional costs of police protection to appellants and further that the ordinance was not the least restrictive means of accomplishing the governmental purposes served by the imposition of fees.

[5] In determining whether additional police protection is needed for purposes of traffic and crowd control, the Orlando ordinance directs the chief of police to consider such factors as the "size, location and nature of the assembly." The ordinance offers no other standards by which to judge the nature of the assembly and it is clear

that the deputy chief of police considered the content of the demonstration and rally in determining the need for additional police protection. Contrary to the district court's holding, the ordinance does not import objective and definite standards to guide the licensing official in considering "whether additional police protection reasonably will be required for the assembly for purposes of traffic and crowd control." A law subjecting the right of free expression in publicly owned places to the prior restraint of a license, without narrow, objective and definite standards is unconstitutional.. Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969). There is

here in the ordinance a potential for bias by the chief of police indetermining how much police protection is needed in considering the nature of the assembly of the permit applicants. There are no standards in guiding the licensing officials in deciding whether the costs of additional police protection should be passed on to those who wish to exercise their First Amendment rights of free speech in a public forum, between those who wish to hold a picnic in a city park on a Sunday afternoon. The phrase "nature of the assembly" simply leaves too much discretion in the chief of police to determine whether additional costs for police protection are needed.

[6] An issue has also been raised whether the city has chosen the least restrictive means of achieving its governmental objective of controlling traffic on public streets and protecting the public safety. The city contends that the regulations are designed to protect "those public interests by requiring persons who parade or march to pay for police protection necessary to protect public safety along the route and are clearly a legitimate exercise of governmental authority."

However, the appellants argue that the chief concerns are not simply public safety but rather, the protection of the public treasury from the costs associated with policing the events. Moreover, the charging

of overtime payment for police salaries is not the least restrictive means of achieving the governmental concerns of protecting the public safety. The use of state-certified reserve officers or the use of regular officers at non-overtime pay, would have served to diminish the restraints upon the exercise of First Amendment rights. We disagree with the district court's holding that the defendants' decision to use active off-duty police, even at an overtime pay rate was not an unreasonable choice under the facts at hand. The city has other reasonable alternatives which it could have utilized to keep the costs for additional police protection that it charged the appellants as low as possible. The use of

reserve police officers, who are not entitled to contractual overtime pay, rather than active duty police officers, was a reasonable alternative for the city to employ.[9]

V. THE CONCURRING OPINION

[7] The concurring opinion agrees that the ordinance is unconstitutional, but only because of its failure to provide for prompt judicial review. Since this particular challenge to the ordinance was neither mentioned in the complaint nor in appellants' brief, we did not discuss it in the original majority opinion. However, since the trial court's failure to find the ordinance unconstitutional on this ground

was "plain error," we agree with the concurring opinion to the extent that it considers the ordinance unconstitutional on the ground stated.

VI. CONCLUSION

We conclude that the ordinance is unconstitutional on its face and as applied.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

ALBERT J. HENDERSON, Circuit Judge, concurring:

I agree that the ordinance here is unconstitutional on its face but only to the extent that it fails to provide for prompt judicial review of the denial of a permit,

an issue left unaddressed by the majority opinion. Strict procedural safeguards are required for prior restraints on speech. See National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44, 97 S.Ct. 2205, 2006, 53 L.Ed.2d 96, 98 (1977) (per curiam). A licensing regulation which grants city officials the discretion to deny permits must provide for speedy review to ensure constitutional protection. See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666, 675-76 (11th Cir. 1984), modified 742 F.2d 590 (1984).

The Orlando ordinance directs the chief of police to determine the amount of police

protection "reasonably" required for traffic and crowd control, Orlando City Ordinance s. 18A.12, and to deny applications for permits if the policing expenses are not prepaid. Id. s.18A.13(8). This authority is precisely the sort of discretion to restrain free expression which triggers the requirement of prompt judicial review. In Miami Herald, for example, this court invalidated a city ordinance which conditioned the issuance of licenses to operate newsracks on compliance with "all applicable provisions of the city Code," Miami Herald, 734 F.2d. at 669. Because it vested in city officials discretion to determine which ordinances and regulations were "applicable" to newspaper vending

machines without also providing for ready judicial review, it failed to supply an adequate constitutional guarantee against an abuse of that discretion. Id at 673-76. The authority to deny parade licenses on the basis of the failure to prepay "reasonably" required expenses confers at least as much discretion as an ordinance permitting the denial of a permit because of noncompliance with "applicable" regulations.

Although the Orlando ordinance states that "[a]ny applicant aggrieved shall have the right to appeal the denial of a permit to the city council of the city." Orlando City Ordinance s. 18A.15, it lacks the adversarial feature of judicial review. "[O]nly a judicial determination in an

adversary proceeding ensures the necessary sensitivity to freedom of expression..." Freedman, 380 U.S. at 58, 85 S.Ct. at 739, 13 L.Ed.2d at 654.

In light of this conclusion, I would not reach the remaining issues. However, because the majority did not feel so constrained, I write separately to express my disagreement with its views on several other important constitutional questions.

The majority misreads Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941), as permitting only nominal charges for policing a demonstration in a public area. The fee approved in Cox was not nominal, but instead ranged "from $300 to a nominal amount." Id., 312 U.S. at

576, 61 S.Ct. at 766, 85 L.Ed. at 1054. The Court found "nothing contrary to the Constitution in the charge of a fee limited to the purpose" of meeting the "expense[s] incident to the administration of the [licensing statute] and to the maintenance of public order..." Id., 312 U.S. at 577, 61 S.Ct. at 766, 85 L.Ed. at 1054.

Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), did not overrule Cox's endorsement of charges greater than a token amount. Murdock invalidated a flat license fee levied on distributors of religious literature. Distinguishing Cox, the Court stated that it was not confronted with

> state regulation of the streets to protect and insure the safety, comfort,

> or convenience of the public. Furthermore, the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitation. As we have said, it is not merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community. And the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors.

Murdock, 319 U.S. at 116, 63 S.Ct. at 876, 87 L.Ed. at 1300 (citations omitted). The majority's reliance on the Murdock Court's use of the word "nominal" misapprehends the basis of the decision--that the flat license tax was not justified by any legitimate state interest. If anything, Murdock reaffirms the principle that concerns for public safety support restrictions on speech.

It is true that the ordinance here permits the assessment of unreasonable fees, an issue not addressed by the Cox Court. The charges there were subject to a limitation. However, the reasoning in Cox establishes that fees are constitutionally permissible as long as they are attributable to the cost of ensuring public safety. A different view would be unprecedented, and contrary to the interpretation of Cox by at least three other circuits. See Eastern Connecticut Citizens Action Group v. Powers, 732 F.2d 1050, 1056 (2d Cir.1983)(license fee invalidated because the plaintiffs failed to show that the charge was equal to the administrative costs incurred); Fernandes v. Limmer, 663 F.2d 619, 633 (5th

CENT. FLA. NUCLEAR FREEZE CAMPAIGN v. WALSH Cir. Unit A. 1981) ("A licensing fee to be used in defraying administrative costs is permissible, Cox v. New Hampshire, supra., but only to the extent that the fees are necessary...."); Baldwin V. Redwood City, 540 F.2d 1360, 1372 (9th Cir.1976) ("In some circumstances a city may both require a permit for activity involving free expression without violating the First Amendment and also collect fees that fairly reflect costs incurred by the city in connection with such activity."), cert. denied, 431 U.S. 913, 97 S.Ct. 2173, 53 L.Ed.2d. 223 (1977).

The majority also faults the ordinance as being content-based. Restrictions founded on the content of speech are

disfavored because of the danger free expression may be discouraged or prohibited "'merely because public officials disapprove the speaker's view.'" Consolidated Edison Co v. Public Service Commission, 447 U.S. 530,, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319, 327 (1980) (quoting Niemotko v. Maryland, 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.Ed. 267, 276 (1951) (Frankfurter, J., concurring)); see also Clark V. Community for Creative Non-Violence,--U.S.--,--, 104 S.Ct. 3065, 3070, 82 L.Ed.2d, 221, 228 (1984). That risk is not present here. Consideration of the nature of the demonstration is strictly limited to evaluating its threat to public safety. The police costs depend not on

whether state officials disapprove of the applicant's message but whether the public reacts disfavorably to the speaker's view. The ordinance does not discriminate on the basis of the group's viewpoint or the subject matter of the demonstration. Speech sufficiently controversial to endanger public safety when presented to one audience at a certain time and place may be completely uncontroversial to another audience at a different time and place. I fail to see how a restriction can be content-based when it treats identical speech differently in varying situations.[1]

Even if the ordinance is content-based it is not, as the majority indicates, automatically unconstitutional. The Supreme

Court has repeatedly made clear that restrictions predicated on the content of the speech are simply analyzed under a stricter standard. "For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794, 804 (1984); see also United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736, 744 (1983); Widmar v. Vincent, 454 U.S. 263, 269-70, 102 S.Ct. 269, 274, 70 L.Ed.2d 440, 448--49 (1981). In my opinion the ordinance here, by virtue of its concern for

public safety, meets this standard.

Because the ordinance is unconstitutional on its face, I see no need to inquire further into the constitutional validity of its application in this instance. However, the majority assumes this additional burden by holding that less restrictive means were available to achieve the governmental purpose of protecting public safety. Deputy chief of police Frederick Walsh testified in his deposition that regular police officers must be paid for overtime under the union contract. See Record, vol. 1 at 169. He also stated that reserve officers are paid the same as regular officers for such duty in many cases since diverting them to police

demonstrations often requires assigning regular officers at overtime pay to replace them. Id. at 182-83. From my review of the record the plaintiffs in this case were not charged different rates than other organizations which use public places for demonstrations or parades.

By holding that local governments must pay virtually all the expense of police protection for a demonstration in a public area, the majority would place the burden of reasonable costs for police services in such a situation on the city alone, a result not mandated by Cox. It is not difficult to foresee the dangerous consequences of inadequate police supervision resulting from a municipality's inability or reluctance to

allocated sufficient funds during, for example, a politically or racially charged parade. Although it would be a laudable gesture for local governments to subsidize the free expression of speech, it is not required by the Constitution. The "First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." Heffron v. International Society of Krishna Consciousness, Inc., 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69 L.Ed.2d. 298, 306 (1981).

FOOTNOTES

TO APPENDIX A

BACKGROUND

1. Section 18A.10(1) of the Orlando City Ordinance provides:

> (1)No person shall advertise, engage in, participate in, and, form or start any outdoor public assembly unless an outdoor public assembly permit shall first have been obtained from the Chief of Police.

Section 18A.11 of the Orlando City Ordinance governs the application requirements for outdoor public assembly permits and states that "Any person seeking the issuance of an outdoor public assembly permit shall file an application with the Chief of Police on the forms provided by the Chief of Police." It further designates the categories of information required, as well as the filing period.

2. Section 18A.12 of the Orlando City Code provides:

After obtaining as much information as the chief of police reasonably deems necessary regarding a permit application, he shall determine whether and to what extent additional police protection reasonably will be required for the assembly for purposes of traffic and crowd control. In making such a determination, the chief of police shall consider such factors as the size, location and nature of the assembly. If additional police protection for the assembly reasonably is deemed necessary by the chief of police, he shall so inform the applicant for the permit. The applicant then shall have the duty to secure police protection reasonably acceptable to the chief of police at the sole expense of the applicant and shall prepay the expenses of such protection.

3. The following colloquies from Deputy Chief Walsh's deposition explain the City's concern about the presence of the Martin Marietta Plant and the possibility of hostile counter demonstrators:

Q. I understand. In the Nuclear Freeze application, looking at the answers to interrogatories, apparently at some level there was some of this concern also put into the process because one of the

things that is said here is whether participants were local or out of town, whether the participants were going to bring counter demonstration, so at the Nuclear Freeze there was some concern at some level that they would draw counterdemonstrators?

A. I am sure there was, yes.

Q. In fact, one of the other statements made in the interrogatories that you prepared the answers to, I understand,--

A. Uh-huh.

Q. --is that due to the controversial nature of the rally and close location to the Martin Marietta plant the plan of hostile counteractivity was considered.

A. That was considered.

Q. You used the extreme of the plan in the black community, but the same thing could enter into the permit process, spectacular kind of event; is that correct?

A. That is correct. May I elaborate on that?

Q Just one thing again for the record. Even I don't know what the Martin Marietta plant does that has relevance to this. In your answer your said due to the controversial nature of the rally, meaning Nuclear Freeze rally, and the close

location of the Martin Marietta plant in Orlando. There is obviously a connection, but I don't know what it is. Do they manufacture nuclear--

A. No, but they are a major defense manufacturer and it is my understanding that they make military missile systems, as I understand.

Q. The concern was in fact employees to Martin Marietta might find that as a threat to their jobs in Orlando?

A. Yes, sir, that was a concern.

4. In determining the need for additional police protection for the Central Florida Nuclear Freeze Campaign parade, the City asserts that it also considered the proposed length and route of the parade, potential need to re-route traffic, close streets and control traffic at intersections, the estimated number of participants, type and function of the parade, number of volunteers to be provided for self-policing the event and the time of day and the date of the parade.

The criteria in determining the protection for the rally also included the total number of persons expected to attend, whether alcoholic beverages

would be sold or consumed, whether entertainment would be provided; the type and function of the event, the location of the event and the nature of the physical facilities provided, i.e., lighting, seating, entrances and exits; and the need for traffic control and parking assistance.

5. Pursuant to agreement between the City of Orlando and the Orange County Police Benevolent Association, Inc., officers ordered to work in excess of 40 hours in a seven day work week must be paid at the rate of one and one-half hours at the regular hourly rate. The total amount required for the parade was $1,202.64. Of this amount, 14 motor officers would be paid at a standard overtime rate of $15.54 per hour. Two sergeants would be employed to command the officers at a rate of $17.30 per hour, one lieutenant at $22.94 per hour and one captain at a rate of $25.38 per hour. The total amount required for the assembly was $233.10, employing three officers at $15.54 per hour.

6. In Cox, the Supreme Court upheld a New Hampshire statute that required demonstrators to obtain a license permit as a prerequisite to holding a parade on public streets and sidewalks. The statute also required demonstrators to

pay a permit fee of not more than three hundred dollars for each day of the demonstration. In upholding the fee requirement, the Court said that because the state had imposed the charge to meet expenses incidental to the administration of the regulation and to costs of policing streets during a parade, the fees were valid. 312 U.S. at 577, 61 S.Ct. at 766.

The application of the holding of the Cox case to the Orlando ordinance in question will be discussed infra .

7. The following statements from Deputy Chief Walsh's deposition explaining the City's rationale for charging the demonstrators the cost of extra police protection:

Q. The question I have is why must the demonstrators pay for protection of the rights that it is your job to guarantee?

A. It has been our position on that issue that were it not for this particular demonstration, then the cost--the cost factor, which it boils down to an amount of dollars here, that the city would have expended would no longer be necessary. In other

words, if the exercise--if the 18A permit were not granted and whatever happens there with that 18-A permit didn't happen, then there would be no potential for a violation of rights or for disorder or anything else, you see. So the reason that the potential exists is because of the events that is happening. So, the question then becomes one of should the taxpayer out of the tax base, the general fund which subsidizes police service to perform a certain function here in the city be--absorb that or should it be absorbed by the people that are actually in the process of exercising their rights. It is a question where I certainly [am] not going to venture an opinion. I am only going to say the City's position has been one that those that obtain the permits underwrite the expense.

I am not trying to mislead you, sir, honest to God. I am trying to give you the--you know, straight from the shoulder.

Walsh Deposition, pp. 19-20

8. During the three year period prior to the event in question of the 152 permit fees charged, only 19 were for public issue assemblages. The balance were for commercial activities, social or sports activities or fund-raising activities. The cost of the public issue permits was approximately $12,000 out of a total of approximately $120,000. This demonstrates one of two possible conclusions: (1) that the costof protecting the right of free speech on public issues is miniscule in the City of Orlando; or (2) that the permit fees discourage public demonstrations in Orlando.

9. The Orlando police department employs reserve police officers who earn between $6.21 per hour and $8.05 per hour. These officers who are generally doctors, lawyers and businessmen volunteer their services for 20 hours a month as auxiliary officers and have all the qualifications and powers of arrest as regular officers. Reserve officers have no contractual claim to overtime payment.

CONCLUSION

1. Interestingly, one commentor points to the precise problem here as support

for abandoning the distinction between content-based and content-neutral restrictions on speech. Redish, The Content Distinction in First Amendment Analysis, 34 Stan.L.Rev. 113, 133 (1981).

APPENDIX B

ORDER, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Appendix B - Order

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CENTRAL FLORIDA NUCLEAR
FREEZE CAMPAIGN and
BRUCE GAGON,

Plaintiffs,

vs. No. 83-797-Civ-Orl-11

WILLIAM KOLESZAR, Chief of
Police, Orlando, Florida,

Defendant.

_____/

ORDER

This cause came on for consideration without oral argument on the Motion for Summary Judgment filed 27 March 1984 by defendant, and the Cross-Motion for Summary Judgment filed 9 April 1984 by plaintiffs. After thorough review of the

motions, the stipulated statement of facts, and other factual submissions, the court concludes that summary judgment should be granted in favor of the defendant.

The facts are established in detail in the parties' stipulation filed as part of plaintiff's Appendix on 9 April 1984. The basis of defendant's motion is the holding of the United States Supreme Court in Cox v. New Hampshire, 312 U.S. 569 (1941). The Supreme Court found that there was no constitutional violation in the charging of a fee to meet the expense incident to the maintenance of public order in the matter licensed, if the licensing and fee determination were administered in a fair and non-discriminatory manner. Cox at 577.

Plaintiffs' arguments that the defendant's decision to impose a fee for additional police protection was both content-based and a prior restraint are without merit. It is reasonable for the defendant to consider the ideas or policies being espoused by the license applicant in making a determination as to the quantity and quality of police protection needed to ensure an orderly parade or rally. The deposition of Chief Walsh demonstrates that this information was relied on in an objective, non-discriminatory fashion which comported with both common sense and the Constitution. The possibility of out-of-town marchers and local reaction are legitimate public safety concerns which can be properly evaluated only by advertence to the content of the

applicant's speech goals.

Plaintiffs characterize the consideration of possible hostile counter-activity as forcing them to pay the police to protect their First Amendment rights. They cite Murdock v. Pennsylvania, 319 U.S. 105 (1943), in support. Under Murdock, if the fee charged by the City of Orlando were in fact a license tax for the privilege of speaking, it would offend the First Amendment. Factually such was not the case. As noted above, Chief Walsh properly and objectively considered the potential for counter demonstrations in calculating additional police requirements, and the amount of the license fee was reasonably related to the expected cost.

Plaintiffs cite Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), for the proposition that an ordinance which confers unbridled power upon authorities to prohibit speech related activities violates the First Amendment. Shuttlesworth requires that narrow, objective, and definite standards be provided to guide the licensing authority. The Orlando ordinance at issue conditions the grant of a permit upon prepayment of certain reasonable costs expected to be created by the activity and other specifically delineated criteria. See Orlando City Code Section 18A.12-.13. Implicitly the fee must bear a reasonable relationship to anticipated costs. The ordinance provides for an expedited appeal to the City Council of a decision of the chief of police to deny the

permit. Orlando City Code Section 18A.15. Such appeal would permit summary review of any adverse action by the chief of police resulting in a denial of the permit. These provisions sufficiently restrict and channel the police chief's discretion so as to protect First Amendment rights.

Contrary to plaintiff's assertion, Cox does stand for the proposition that the fees charged may be used to protect the public fisc. Indeed, that is part of their constitutional justification. Where the public activities of a specific person or group generate abnormal requirements for police protection to secure the right of the general public to order and safety, Cox allows the cost thereof to be passed on to those whose activities occasion it.

Although the city could choose to absorb the costs of all speech activity, nothing in the Constitution requires it to do so. Cox, supra.

Plaintiffs' final argument is that the doctrine of least restrictive means requires the chief of police to utilize as cheap a means as possible to protect the public safety when public issue speech activity is involved. Plaintiffs make no showing that unreasonably expensive police protection was required by the defendant as a means of intentionally obstructing plaintiffs' speech plans. The defendant's decision to use active off duty police, even at an overtime pay rate, is not on its face a constitutional violation. The guidelines in the ordinance would allow the defendant to

choose whatever form of protection is reasonably calculated to protect the public safety, as well as the safety of the marchers. That calculation may require active (and therefore more expensive) officers rather than reserve officers. Use of the city's active force rather than reserve officers, most of whom hold full-time jobs in the community, was not an unreasonable choice under the unique facts at hand. See deposition of Chief Walsh at 33-38.

The court concludes that the Orlando ordinance was facially valid and constitutionally applied by the defendant. The Clerk will enter judgment for the defendant.

DONE AND ORDERED in Chambers at Orlando, Florida, this 5th day of November, 1984.

(John A. Reed, Jr.)
Judge

APPENDIX C

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Appendix C- First Amendment to the United States Constitution

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D

CHAPTER 18A, CITY OF ORLANDO CODE

APPENDIX D - CHAPTER 18A, CITY OF ORLANDO CODE

CHAPTER 18A

PARKS AND OUTDOOR PUBLIC ASSEMBLIES

Section 18A.01. Definitions.

The following terms, when used in this Chapter shall have the meanings respectively ascribed to them in this section:

(1) ADVERTISE is the act of publicly announcing or calling public attention to a person, thing, place or event and shall include, but not be limited to, the distribution of handbills or mass mailings, the use of outdoor advertising and announcements by radio, television, or newspaper.

(2) BICYCLE PATH is defined as a public way intended primarily for bicyclists, at the side of a street

or in or through a public park or other public property.

(3) CHIEF OF POLICE is the Chief of Police of the City of Orlando, Florida, or his designee.

(4) DIRECTOR OF ORLANDO CENTROPLEX is the Director of the Orlando Centroplex Department of the City of Orlando, Florida, or his designee.

(5) DIRECTOR OF PARKS AND RECREATION is the Director of the Parks and Recreation Department of the City of Orlando, Florida, or his designee.

(6) DISCRIMINATION is any difference in the treatment or favor extended to a natural person, including

exclusion or segregation, because of race, color, religion, national origin, ancestry or sex.

(7) OUTDOOR PUBLIC ASSEMBLY (also referred to herein as assembly) is any ceremony, show, exhibition, concert, pageant, rally, demonstration, or assembly of any kind calculated to attract at any one time the attendance or attention of over one hundred (100) persons which is held in any stadium, field or park or any other place without a roof over the entire area in which the assembly is held or in any temporary structure such as a tent within the city limits of Orlando, and any

parade as defined herein.

(8) OUTDOOR PUBLIC ASSEMBLY PERMIT (also referred to herein as permit) is a permit as required by this Chapter.

(9) PARADE is any parade, march, ceremony, show, exhibition, pageant, or procession of any kind, or demonstration of any kind, or similar display or activity in or upon any street, sidewalk, public right-of-way, bicycle path, or public parking facility, owned by or under the supervision or control of the city.

(10) PARKS are those areas listed in Sections 18A.02 and 18A.07 and any other areas officially designated

by City Council as a park and posted as such.

(11) PARK FACILITIES are any improvements or structures, either natural or artificial, including but not limited to the Eola Park Band Shell, and any other buildings, shelters, benches, tables, playground equipment, bird feeders, walls, fences, fountains, walkways, toilet facilities and signs located in, upon or around a park.

(12) PARK GROUNDS are the real property upon which parks are located and any and all trees, shrubbery, flowers, leaves, grasses, plants, fruit, mushrooms, toadstools, dirt

and rocks located above, on or under said property.

(13) PERSON is any individual person, or any firm, partnership, association, corporation, company or organization of any kind, or any combination of such persons.

(14) PUBLIC USE is any lawful utilization of park grounds and facilities which is not prohibited by any applicable regulation, ordinance, or law and which does not in fact interfere with, or tend to interfere with or obstruct the use of the park grounds or facilities by the general public or by any other person previously authorized to utilize the same.

(15) SIDEWALK is any area or way set aside or open to the general public for purposes of pedestrian traffic, whether or not it is paved.

(16) STREET is any place or way set aside or open to the general public for purposes of vehicular traffic, including any berm or shoulder parkway, right-of-way, or median strip thereof.

(17) SUNSET is the time of day designated as sunset by the Nautical Almanac Office, United States Naval Observatory, Washington, D. C.

Sec. 18A.10. Permit required.

(1) No person shall advertise, engage

in, participate in, aid, form or start any outdoor public assembly unless an outdoor public assembly permit shall first have been obtained from the Chief of Police.

(2) Exceptions. This section shall not apply to, nor shall a permit be required in, the following instances except as specifically indicated:

(a) Funeral processions.

(b) Activities of a governmental agency acting within the scope of its governmental authority.

(c) Any bona fide athletic event or contest which is scheduled or sponsored by the City of Orlando Bureau of Recreation or by bona fide elementary school, junior high

school or high school situated within the City.

(d) Peaceful picketing in compliance with Section 43.42 of this Code; provided, however, that such peaceful picketing is conducted off the street or roadway and not in a manner as to obstruct vehicular or pedestrian traffic. Any peaceful picketing which crosses, traverses, or is otherwise conducted in or upon any street or roadway shall not be exempted from the permit requirement of this section.

Sec. 18A.11. Application for outdoor public assembly permit.

Any person seeking the issuance of an outdoor public assembly permit shall file an application with the Chief of Police on forms provided by the Chief of Police.

(1) Filing period. An application for a permit shall be filed with the

Chief of Police not more than one hundred eighty (180) days before, and not less than fifteen (15) before, the date and time at which it is proposed to commence the assembly; provided, however, that for good cause shown the Chief of Police may waive the minimum fifteen-day filing period and may accept an application filed within a shorter period if after due consideration of the date, time, place, and nature of the assembly, the anticipated number of participants, and the necessity for an amount of City services which will be required in connection therewith, the Chief of Police

determines that such waiver will not present a hazard to the public safety in/by the reduced amount of time available within which to fully process the application. The application shall be signed by the applicant under oath.

(2) Contents. The application for a permit shall set forth the following information, and such other information as may from time to time reasonably be required:

(a) The name, place of residence, mailing address and telephone number of the person seeking to conduct the assembly.

(b) If the assembly is proposed to be conducted for, on behalf of, or by an organization, the

name, address and telephone number of the headquarters of the organization and of the authorized and responsible heads of such organization.

(c) The name, place of residence, mailing address, and telephone number of the individual person who will be the assembly chairperson and who will be responsible for the conduct of the assembly.

(d) The date when the assembly is to be conducted.

(e) Nature of the assembly including the type or types of activities which will occur during its conduct.

(f) The hours when such assembly will start and terminate.

(g) A description of any and all recording equipment, sound amplification

equipment, banners, signs, or other attention-getting devices which will be utilized in connection with the assembly.

(h) The approximate number of participants, not including spectators, who will participate in the assembly.

(i) The approximate number of spectators who will be present at or near the assembly.

(j) If the assembly is designed to be held by, and on behalf of or for, any person other than the applicant, the applicant for such permit shall file with the director of public safety a communication in writing from the person proposing to hold the assembly, authorizing the applicant to apply for the permit on his behalf.

(k) The purpose of the assembly, if there is an avowed purpose.

(l) The exact location of the assembly and if the assembly is a parade, the location by streets of any marshaling area or areas for such parade.

(m) A designation of any public facilities or equipment proposed to be utilized.

(n) If the application is for a parade, it also shall set forth the following information:

1. The time at which units of the parade will begin to arrive at the marshaling area or areas, and the times at which all such units will be disbursed therefrom.

2. The route to be traveled, including the starting point and the termination point.

3. The approximate number of persons

who, and animals and vehicles which, will constitute such parade, type of animals and the description of the vehicles.

4. A statement as to whether the parade will occupy all or only a portion of the width of the streets or sidewalks to be used.

(3) Fees.

(a) A fee to cover the expenses incident to processing shall be paid to the City of Orlando by the person applying for the permit at the time of filing of the application. The fee shall be in accordance with a schedule of fees approved by city council by resolution.

This fee shall not be refunded in the event the application is denied.

(b) If the application is for the use of any city property or if any city services shall be required for the assembly, the applicant shall pay, prior to the issuance of a permit, the charges therefor in accordance with a schedule of fees approved by city council by resolution.

(c) The mayor administratively and without action by the city council may approve requests for contributions of up to fifty dollars ($50.00) for

fees for assembly permits to organizations requesting such contribution. Should the mayor disapprove such a request, the request may then be submitted to city council for consideration.

Section 18A.12. Police protection

After obtaining as much information as the chief of police reasonably deems necessary regarding a permit application, he shall determine whether and to what extent additional police protection reasonably will be required for the assembly for purposes of traffic and crowd control. In making such a determination, the chief of police shall consider such factors as the size, location

and nature of the assembly. If additional police protection for the assembly reasonably is deemed necessary by the chief of police, he shall so inform the applicant for the permit. The applicant then shall have the duty to secure police protection reasonably acceptable to the chief of police at the sole expense of the applicant and shall prepay the expenses of such protection.

Sec. 18A.13. Standards for issuance of permit.

The chief of police shall issue a permit as provided for hereunder when, from a consideration of the application and from other information as may otherwise be obtained, it appears that:

(1) The conduct of the assembly will

not interrupt substantially the safe and orderly movement of other pedestrian or vehicular traffic in or contiguous to the route or location of the assembly.

(2) The conduct of the assembly will not require the diversion of so great a number of police officers of the city to properly police the assembly area and the areas contiguous thereto, as to prevent normal police protection from being furnished to other parts of the city.

(3) The concentration of persons, animals and/or vehicles at the assembly will not interfere unduly with proper fire and police

protection of, or ambulance service to, areas contiguous to the assembly area or other areas of the city.

(4) The conduct of the assembly is not reasonably likely to cause injury to persons or property, or to provoke disorderly conduct as defined in Florida Statutes, Section 877.03.

(5) Adequate sanitation and other required health facilities are or will be made available in or adjacent to the assembly area.

(6) The conduct of the assembly will not result in noise at a level inappropriate for the area(s) surrounding the assembly.

(7) There are sufficient parking places near to the site of the assembly to accommodate the approximate number of automobiles reasonably expected to be driven to the assembly; such number of automobiles to be reasonably estimated by the chief of police.

(8) The applicant has secured the police protection, if any, required under section 18A.12 of this Code, and has prepaid the expenses therefor.

(9) If the assembly is a parade, such parade is not to be held for the primary purpose of advertising any

product, goods, or event, which is primarily for private profit, and the assembly itself is not primarily for profit; provided, however, the prohibition against advertising any product, goods or event shall not apply to signs identifying organizations or sponsors furnishing or sponsoring exhibits or structures used in the conduct of the assembly. Nothing in this subsection shall be construed to prohibit the issuance of a permit as provided for in this chapter when the assembly or parade is to take place on Livingston Street between Hughey Avenue and

Parramore Avenue in conjunction with an activity, approved by the City of Orlando, conducted in the Orlando Centroplex; provided, however, that the appropriate rental fees have been paid to the City of Orlando for such use of Livingston Street and that an appropriate fire lane is at all times maintained on such street.

(10) If the assembly is to take place in Loch Haven Park, such assembly has been approved by city council after recommendation by the Loch Haven Park Board, as required under section 2.146(4) of this Code.

(11) If the assembly is to take place in a park, such assembly will not

chief of police disapproves the application, he shall notify the applicant either by personal delivery or certified mail, within such time period, of his action stating the reasons for his denial of the permit.

Sec. 18A.15. Appeal procedure.

Any applicant aggrieved shall have the right to appeal the denial of a permit to the city council of the city. The appeal shall be taken by the applicant within five (5) days after receipt of the notice of denial by filing a written notice with the chief of police with a copy to the city clerk. The city council shall consider the appeal at the next regularly scheduled meeting following receipt by the chief of police of the notice of appeal, and shall

direct the chief of police forthwith to issue a permit unless good cause shall be made to appear for the denial of the issuance thereof on the grounds herein stated.

Sec. 18A.16. Alternative permit.

The chief of police, in denying an application for a permit shall be empowered to authorize the conduct of the assembly on a date, at a time, over a route or in a location different from that named by the applicant. An applicant desiring to accept an alternate permit shall, within five (5) days after notice of the action of the chief of police, file a written notice of acceptance with the chief of police. An alternate permit shall conform to the

requirements of, and shall have the effect of, a permit under this chapter.

Sec. 18A.17. Notice to city officials.

Immediately upon the issuance of a permit, the chief of police shall send a copy thereof to the following:

(1) Mayor;

(2) City clerk;

(3) Transportation engineer;

(4) Director of parks and recreation;

(5) Chief of the fire department.

Sec. 18A.18. Contents of permit.

Each permit shall state the following information:

(1) Nature of the assembly.

(2) Date of the assembly.

(3) Starting time and termination time of the assembly.

(4) The location of the assembly or the portions of the streets, parks or other public facilities to be traversed or occupied by the assembly.

(5) The approximate number of persons, animals and/or motor vehicles that will participate in the assembly.

(6) The approximate number of spectators who will be present at or near the assembly.

(7) Such other restrictions as the chief of police shall find necessary or appropriate to the enforcement of this chapter.

Sec. 18A.19. Duties of permittee.

A permittee hereunder shall comply with all permit directions and conditions, and with all applicable laws and ordinances. The assembly chairperson or other person heading or leading such assembly shall carry the permit upon his person during the conduct of the assembly and shall display the permit upon demand to the chief of police or any officer of the Orlando Police Department.

Sec. 18A.20. Public conduct during assemblies.

(1) Interference. No person shall unreasonably hamper, obstruct or impede, or interfere with any duly licensed assembly,

or with any person, vehicle, or animal participating or used in such assembly.

(2) Driving through parades. No driver of any vehicle unless specifically permitted by an officer of the Orlando Police Department or of the Orange County Sheriff's Department, shall drive between the vehicles of persons comprising a duly licensed parade when such vehicles or persons are in motion and are conspicuously designated as a parade.

(3) Parking on parade route or in an area near assembly. The chief of police shall have the authority, when reasonably necessary, to prohibit or restrict the parking of vehicles along a highway or part therof constituting a part of the route of a parade or an area needed for

the safe and efficient flow of traffic to or from an assembly. The chief of police shall post signs to the effect and it shall be unlawful for any person to park or leave unattended any vehicle in violation thereof.

Sec. 18A.21. Revocation of permit.

The chief of police shall have the authority to revoke a permit issued hereunder instantly upon violation of any one or more of the conditions or standards for issuance as herein set forth.

Sec. 18A.22. Discrimination prohibited.

It shall be unlawful for any permittee, or any agent or employee of the permittee, either directly or indirectly:

(1) To discriminate against any natural person by refusing, withholding, or denying to such person any of the services, advantages, facilities or privileges offered or available to any other person attending the assembly, or by setting different rates or charges therefor, or by placing or attempting to place any such natural person in a separate and segregated section or area at the assembly.

(2) To publish, circulate, display, post or mail any written or printed communication or notice to the effect that any of the services, advantages, facilities or privileges of the assembly will be

refused, withheld or denied to any natural person on account of the person's race, color, religion, national origin, ancestry, or sex, or that the person's attendance and presence at the assembly is unwelcome or objectionable, or that the person will be prohibited from mingling with other persons at the assembly because of the person's race, color, religion, national origin, ancestry or sex.

(3) To aid, abet, incite or coerce the doing of any act declared herein to be unlawful, or to prevent or attempt to prevent any person from complying with the provisions of this section.

Appendix D - Chapter 18A, City of Orlando Code

Sec. 18A.23. Indemnification.

The applicant and any other persons, organizations, firms or corporations on whose behalf the application is made, by filing a permit application shall represent, stipulate, contract and agree that they will jointly and severally indemnify and hold the city harmless against liability, including court costs and attorney's fees, and attorney's fees on appeal, for any and all claims for damage to property, or injury to, or death of persons arising out of or resulting from the issuance of the permit or the conduct of the assembly or any of its participants.

Sec. 18A.24. Penalties.

(1) It shall be unlawful for any person to stage, present, or conduct any assembly without first having obtained a permit therefor as herein provided.

(2) It shall be unlawful for any person knowingly to participate in an assembly for which a permit has not been granted.

(3) It shall be unlawful for any person in charge of or responsible for the conduct of a duly licensed assembly knowingly to fail to comply with any condition of the permit.

(4) Any person violated the provisions of any section of this chapter shall, upon conviction, be punished as provided in section 1.08 of this Code.

Sec. 18A.25. Activities attracting less than one hundred people.

The chief of the parks and special facilities bureau shall have the authority to schedule activities in parks which are not calculated to attract the attendance or attention of over one hundred (100) persons at any one time. The chief of the recreation bureau shall have the authority to schedule activities in recreation areas which are not calculated to attract the attendance or attention of over one hundred (100) persons at any one time. Charges for such scheduled use of parks and recreation areas shall be in accordance with a schedule of fees adopted by city council by resolution, and procedures and standards

utilized for such scheduling shall be in accordance with policy and procedures approved by city council.

Sec. 18A.25. Activities attracting less than one hundred people.

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utilized for such scheduling shall be in accordance with policy and procedures approved by city council.

APPENDIX E.- SECTION 43.42, CITY OF ORLANDO CODE

Sec. 43.42. Picketing; definitions; where prohibited; exceptions.

(1) For the purposes of this section, the following definitions shall apply:

(a) Picket: The word "picket" shall mean to position oneself, or to assemble or gather, as a means of protest, or as a means of presenting or advocating a cause or grievance.

(b) Peaceful picketing: The term "peaceful picketing" shall mean any tranquil and peaceful means of presenting a cause to the public which is devoid of noise or tumult or

APPENDIX E

SECTION 43.42, CITY OF ORLANDO CODE

quarrelsome demeanor, and which does not violate or disturb the public peace or private property rights.

(c) Residential or dwelling unit: The term "residential or dwelling unit" shall mean any single or multifamily residence, to include units within an apartment or condominium complex. The term shall not include those establishments serving or catering to the transient public such as motels, hotels, or motor hotels.

(2) It shall be unlawful for any person or persons to picket before or about any

residential or dwelling unit of any person.

(3) This section shall not apply to a person peacefully picketing upon property which he owns or of which he is lessee, nor does it prohibit the peaceful picketing of a place of employment involved in a labor dispute, including a residential or dwelling unit used as a place of business, or peaceful picketing within a place commonly used for public assembly.

APPENDIX F

MEMORANDUM AND ORDER,
STONEWALL UNION v. CITY OF COLUMBUS
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

APPENDIX F - MEMORANDUM AND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STONEWALL UNION, ET. AL. :

Plaintiffs, :

vs. : Case C-2-85-849

CITY OF COLUMBUS, ET AL.,:

Defendants. :

MEMORANDUM AND ORDER

This case is before the Court on plaintiffs' motion for a preliminary injunction to enjoin the City of Columbus from requiring plaintiffs to pay an $85.00 permit application fee and $1,090.70 in police costs before issuing plaintiffs a parade permit for a June 30, 1985 function.. For the reasons stated below, plaintiffs' motion for a preliminary injunction is DENIED.

FACTS

Plaintiffs Stonewall Union and Craig Covey bring this action to challenge the constitutionality of the City of Columbus ordinance that requires an applicant for a parade permit to pay an $85.00 fee to cover the expenses incident to processing the application for a parade permit. Article Three, Chapter 2111, Section 2111.03(c). Plaintiffs also challenge the constitutionality of the section of the parade permit ordinance that requires an applicant for a parade permit to pay the cost of police officers and police vehicles which the Director of Public Safety determines are necessary to control traffic along the route of the planned parade. Article Three, Chapter

2111, Section 2111.04. Plaintiffs contend that the permit application fee and traffic control expenses are unconstitutional burdens on plaintiffs' freedom of speech and freedom of association as guaranteed by the First Amendment of the Constitution of the United States.

Plaintiff Stonewall Union is a voluntary, non-profit association formed for the purposes of promoting and protecting the civil rights of gay and lesbian individuals. Plaintiff Craig Covey is a member of and Executive Director of the Stonewall Union. Mr. Covey is responsible for the organization and execution of various activities of Stonewall Union, including the organization and coordination of parades and public assemblies.

Appendix F - Memorandum and Order

The controversy in this case arises from plaintiffs' efforts to obtain a parade permit for the 1985 Ohio-Michigan Gay Rights Parade (the "1985 Parade"). The 1985 Parade is an annual event that has been held in Columbus since 1982. The 1985 Parade is scheduled to begin on June 30, 1985, at 2:00 p.m. in Goodale Park and will proceed on High Street -- the major North-South artery in Columbus -- and on other downtown streets to the Ohio Statehouse, where a rally will be held from approximately 3:00 p.m. to 4:30 p.m. It is anticipated that the 1985 Parade will consist of approximately 3,000 persons, one half-dozen automobiles, two to three motorcycles, and perhaps a sound car. Stonewall Union plans to provide its own parade marshals to maintain order.

Appendix F - Memorandum and Order

On March 18, 1985, plaintiff Covey met with officers of the Columbus Police Department for the purpose of determining the number of police that would be needed to direct traffic along the 1985 Parade route. This meeting was required by Article Three, Chapter 2111, Section 2111.04 of the Columbus City Code, which requires the Director of Public Safety to determine the number of officers and vehicles reasonably necessary to control traffic during a parade. Once the Director of Public Safety determines the cost of traffic control, the applicant is required to deposit that amount of money with the Traffic Bureau of the Columbus Division of Police forty-eight (48) hours prior to the date of the parade. On April 24, 1985, plaintiff Covey was informed by the police

that twenty officers, two sergeants, one lieutenant, and five police vehicles would be assigned to supervise the parade at a cost of $1,090.70.

At the time of the preliminary injunction hearing, defendants had submitted the affidavit of Karl Barth, Administrative Lieutenant of the Columbus Division of Police, Traffic Bureau, who was responsible for ascertaining the number of police officers who would be needed to control traffic along the route of the 1985 Parade. Barth's affidavit states that he determined that fifteen officers, one lieutenant, one sergeant, and four vehicles would be required to police the parade. Barth's affidavit

avers that the cost for traffic control for the 1985 Parade is $672.50.[1]

At the preliminary injunction hearing, plaintiff Covey testified that Stonewall Union would pay whatever costs were necessary to ensure that the 1985 Parade went forward as scheduled. Mr. Covey testified that Stonewall Union did not have funds budgeted to pay the assessment for traffic control at the present time, however, if it is necessary for Stonewall Union to make the required pay-

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1 According to Barth's affidavit, the difference in the cost figures resulted from the addition of five more officers as well as one more supervisor and one more vehicle to the original list of personnel he determined to be necessary for traffic control, an addition made at plaintiff Covey's request.

ments to hold the 1985 Parade, the money to do so would be found.

Finally, defendants submitted the affidavit of Toni Collins, Office Manager of the Business and Personnel Bureau of the Columbus Division of Police. Collins' affidavit included a summary of department records regarding parades conducted since the present ordinance went into effect on July 9, 1984. The records indicate that thirty-three "parades" were held in Columbus from July 23, 1984, to June 6, 1985. The prepayment amount ranged from $40.75 for events needing one officer for the required minimum of three hours and one police vehicle, to a prepayment amount of $6,400.00 for an event requiring sixty-eight officers, seven supervisors, and

twelve police vehicles. (Exhibit C, Affidavit of Toni Collins.)

DISCUSSION

I.

There are few, if any, rights more precious and more indispensible to a free and open democratic society than the rights guaranteed by the First Amendment of our Constitution, made applicable to the States by the Fourteenth Amendment. It is our heritage and our pride that in this nation any person may speak freely without fear of government censorship, harrassment, or intimidation. The podium may be the steps of a capital building, a sidewalk at a busy intersection, a letter to a newspaper editor, a telegram to a politician or other variations of the figurative soap box. It is a

right guaranteed on an equal basis to rich and to poor, to promoters of popular, generally accepted viewpoints, and to advocates of unpopular, minority positions. It is the duty of courts to preserve the rights of all, especially those who may be politically or economically powerless or who espouse ideas which are unacceptable to many others. The courts must be vigilant to be certain that government, by the imposition of financial burdens or other impediments, does not decide who shall speak and what shall be said:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is thought control. Any restriction on expressive activity because of its

> content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, [376 U.S. 254] at 270, 84 S.Ct. [710] at 721.

Collin v. Smith, 578 F.2d 1197, 1202 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

In the present case, plaintiffs assert that their cause -- instilling in the public a greater awareness of the civil rights of persons characterized by plaintiffs as gay or lesbian -- is not a popular cause. If this is so, it is reason for greater vigilance to insure that their right to speak is protected to the same degree as organizations advocating causes that enjoy widespread support by the vast majority of citizens. To the extent

that freedom of speech and of assembly is denied to any individual or group, no matter how unpopular that person or group may be, our society suffers from an erosion of our basic constitutional rights.

II.

From the earliest days of our Republic, the use of streets as a forum for the expression of particular viewpoints has been recognized, and it is beyond dispute that the right to assemble and parade is subject to First Amendment protection. As the Supreme Court stated almost a half century ago:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and

> discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the use of regulation be abridged or denied.

Hague v. C.I.O., 307 U.S. 496, 515-516 (1939).

III.

As vital as First Amendment rights are, they are not, of course, absolute. They do not, for example, protect a person from the consequences of engaging in obscenity or libel where the rights of others must be weighed and considered. In the case of a

parade in public streets, as the Haque court noted, the right is not absolute and must be exercised "in subordination to the general comfort and convenience, and in consonance with peace and good order." Parades in the public streets involve more societal concerns than does a single person standing on the sidewalk espousing a particular viewpoint. Persons desiring to march on public thoroughfares and streets, which are normally the exclusive realm of vehicular traffic, present problems of safety and traffic control that warrant some control by public officials for the "peace and good order" of the community.

The leading case on the constitutionality of regulations governing

the use of public streets for parade is Cox v. New Hampshire, 312 U.S. 569 (1940). In that case a state statute requiring marchers to obtain a license before having a parade on public streets and requiring a permit applicant to pay a fee of not more than $300.00 was attacked as an unconstitutional abridgement of First Amendment rights. In upholding the validity of the state law, the Supreme Court explicitly recognized the right of a municipality to impose regulations governing the use of public streets for the maintenance of public order.

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use

> of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection.. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions.

Cox v. New Hampshire, 312 U.S. at 574.

The question in each case is whether the recognized right to regulate the use of the streets for parades is exercised by the municipality so as "not to deny or unwarrantly abridge the right of assembly and the

opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." Cox v. New Hampshire, 312 U.S. at 574. The Supreme Court, construing the statute in Cox as involving only considerations of "time, place and manner so as to conserve the public convenience" and as prohibiting any discriminatory treatment, found that the limited authority conferred on the licensing board did not contravene any constitutional right.

Of special significance to the present case is the Supreme Court's consideration in Cox v. New Hampshire of the constitutionality of a requirement that a fee be paid in advance in order for

demonstrators to obtain a parade license. The lower court construed the statute as requiring a "reasonable fixing of the amount of the fee" which could vary from a nominal amount up to $300, depending in part on the length of parade, the crowds, and the public expenses of policing the event. In referring to this type of a charge, the Supreme Court expressly held:

> The fee was held to be "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed... " There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees

> which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

Cox v. New Hampshire, 312 U.S. at 557 (emphasis added).

In the face of this explicit language in Cox v. New Hampshire, plaintiffs urge this Court to either ignore it as dictum or to disregard it as outdated. This Court can do neither. The Supreme Court expressly considered a municipality's right to impose a license fee and found that so long as the fee was designed to meet (1) actual expenses incident to the administration of the law, and (2) the cost of maintaining public order for the parade, such a charge did not impermissibly burden First Amendment rights.

There is nothing in United States v. Grace, 461 U.S. 171 (1982), relied on by plaintiffs, that detracts from the Supreme Court's decision in Cox v. New Hampshire. Plaintiffs urge this Court to apply the compelling state interest test utilized in Grace to the Columbus ordinance. In Grace, the Supreme Court was evaluating an ordinance that placed an absolute prohibition on the exercise of First Amendment rights on the sidewalks in front of the Supreme Court building. Unlike the ordinance that was held invalid in Grace, the Columbus ordinance is not an absolute prohibition of a particular activity; instead, it is designed to regulate parades held on Columbus streets in an orderly manner.

Grace explicitly reaffirms the rule of law that, absent imposition of a total ban, use of streets for expressive conduct may be restricted by

> reasonable time, place, and manner regulations so long as the restrictions are 'content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'

United States v. Grace, 461 U.S. at 171 (citations omitted).

Application of the standards that were reaffirmed in Grace to the Columbus ordinance shows that it is a constitutionally permissible regulation of expressive conduct. On its face, the ordinance is content-neutral. It is tailored to serve a significant governmental interest by protecting the public,

protecting the paraders, and promoting the public convenience by requiring professional police officers to be used for traffic control of every parade held in the public streets in the City of Columbus, thus accomplishing objectives that could not be achieved through alternate, less restrictive means. Further, the charges imposed by the ordinance are only for the administration costs and traffic control costs created by the parade in question. There are also alternative channels of communication available to the plaintiffs, who are free to use the side-walks for their march to the Statehouse

without payment of any fee.[2] Thus, the Court finds that, on the present state of the record, the Columbus ordinance on its face is a constitutionally permissible regulation of expressive conduct.

Although constitutional on its face, the question remains whether, because of a perceived unpopular parade or for other reasons, the ordinance has been unconstitutionally applied in this case.

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2 Recently, on May 18, 1985, approximately 5,000 members of the Boy Scouts of America celebrated their Diamond Jubilee by marching to the State capitol building. The march was conducted on the public sidewalks without the requirements of a street parade permit or the payment of costs. Affidavit of Karl L. Barth, Administrative Lieutenant, Traffic Bureau, Division of Police.

IV.

1.

In light of Cox V. New Hampshire it seems clear that a municipality may constitutionally recover the cost of processing an application for a parade permit. In the present case, the evidence indicates that the actual cost of processing a parade permit exceeds the charge imposed by the ordinance. (Notice of Filing Supplemental Exhibits: Fees for Services, Cost/Revenue Study, Fiscal Year 1982). There is certainly nothing in the record now before the Court to show that the license fee is excessive or unreasonable or has been applied to plaintiffs in any discriminatory manner.

The Columbus ordinance also requires prepayment of costs for traffic control. The ordinance sets forth specific factors to be considered by the Director of Public Safety when determining the number of police officers reasonably necessary to control traffic. The Director of Public Safety is required to consider the time, date, route, length, number of participants, and number of vehicles when assessing the traffic control needs for a parade. Article Three, Chapter 2111, Section 2111.04. On the present state of the record, there has been no showing that the assessment of costs for traffic control is in any way content based or that it is applied in a discriminatory manner: the determination of the number of

police officers required for a given parade made solely on the basis of tne requirements for traffic control. Furthermore, the adjustable fee system utilized by the City of Columbus is more protective of First Amendment rights than is a flat fee arrangement because the flexibility of adjustment tends to conserve, rather than impair, the exercise of free speech. Cox v. New Hampshire, 312 U.S. at 577.

3.

This Court is sensitive to the possibility that an ordinance of this nature has the potential for abuse and for discrimination against disfavored viewpoints or organizations. Thus far, however, based only on the present state of the record, the ordinance appears to have been applied in an

objective and non-discriminatory manner to the applications of many organizations of widely differing interests and objectives, including the plaintiff Stonewall Union.

Plaintiffs argue with some force that the collection of costs for traffic control of a parade means little, as a practical matter, to Columbus in terms of the City's total budget for police protection; that it serves to discourage parades and, indeed, has caused some organizations to change the site of their events to suburban localities where no fees are charged; and that the Columbus community would be better served by Columbus absorbing such costs and permitting anyone to parade without

the expenses imposed by the present ordinance. Such arguments should be addressed to the legislative body of Columbus and not to this Court. The wisdom of such an ordinance is for Columbus City Council; its constitutionality is for this Court.

The fact that defendants can constitutionally impose the requirements of the ordinance has been decided by the Supreme Court in Cox v. New Hampshire; plaintiffs have not shown, on the present state of the record, that the present ordinance is an unduly burdensome imposition on the exercise of their First Amendment rights or that it has been discriminatorily applied.

VI.

For a preliminary injunction to issue, plaintiffs must show not only a substantial likelihood of success on the merits but also that plaintiffs will suffer irreparable injury if the injunctive relief is not granted. Mason County Medical Ass'n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977). For the reasons stated earlier in this memorandum decision, the Court concludes that plaintiffs have not shown a substantial likelihood that they will succeed on the merits in challenging the constitutionality of the ordinance in question. Although the loss of First Amendment freedoms, for even minimal periods of time,can constitute irreparable injury, Elrod v. Burns, 427 U.S.

347, 373, (1975), the present record does not show, for the reasons given, that plaintiffs will suffer a loss of their First Amendment rights if the preliminary injunction is not granted.

What plaintiffs have shown thus far is a desire to have this Court declare the ordinances invalid so that plaintiffs can avoid payment of the fees required for the permit. There has been no evidence that plaintiffs are unable to pay those fees; indeed, there is more than enough money in the treasury of the Stonewall Union to cover these expenses, although at the present time the money is budgeted for other types of anticipated parade costs. Plaintiff Covey emphatically expressed the determination to proceed with the parade and to pay the permit

costs unless, prior to the date for the parade, this Court should enjoin the City from collecting such fees. Furthermore, there is no evidence of a threatened criminal prosecution if the parade is held without the required permit and payment of the permit fees. The Court fully appreciates both the sincerity of the plaintiffs in challenging the ordinance and the importance of the issues raised by that challenge, but more is required to establish an irreparable injury than the mere reallocation of budgeted parade costs. See Sampson v. Murray, 415 U.S. 61, 90 (1974).

VII.

This Court is mindful of the Supreme Court's admonition in Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1974):

> The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits. It is recognized, however, that the district court must weigh carefully the interests on both sides. Although only temporary, the injunction does prohibit state and local enforcement activities against the federal plaintiff pending final resolution of his case in the federal court. Such a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of Younger.

On the present state of the record, plaintiffs have failed to meet the stringent standard for the issuance of a preliminary injunction and, accordingly, plaintiff's motion for a preliminary injunction is DENIED.

IT IS SO ORDERED.

(John D. Holschuh)
John D. Holschuh, Judge
United States District Court

Supreme Court, U.S.
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CLERK

NO. 85-1336

in the

Supreme Court

of the

United States

October Term, 1985

FREDERICK J. WALSH, CHIEF OF POLICE
OF ORLANDO, FLORIDA

Petitioner,

vs.

CENTRAL FLORIDA NUCLEAR FREEZE
CAMPAIGN AND BRUCE GAGNON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

MAY A CITY, AS A PREREQUISITE TO ISSUING A PERMIT FOR THE USE OF A PUBLIC FORUM BY PERSONS ENGAGED IN PROTECTED FIRST AMENDMENT ACTIVITIES, CHARGE THE USERS THE FULL COST OF THE POLICE SERVICES THE CITY DEEMS NECESSARY FOR TRAFFIC AND CROWD CONTROL, INCLUDING THE COSTS ASSOCIATED WITH PROTECTING THE SPEAKERS FROM HOSTILE ATTACKS BY DISAGREEING OBSERVERS?

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STATEMENT OF THE CASE

This case is not complicated. The City of Orlando, Florida, pursuant to a local ordinance, conditioned the exercise of First Amendment rights upon payment of the projected cost of providing police services for a planned anti-nuclear parade and rally. The District Court upheld the validity of the ordinance in a brief, unreported order, citing *Cox v. New Hampshire*, 312 U.S. 569 (1941). (Pet. App. B-86a).

The Court of Appeals for the Eleventh Circuit reversed, concluding that requiring pre-payment for police services as a condition to exercising First Amendment rights was "unconstitutional on its face and as applied." *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515,1526 (11h Cir.1985) (Pet.App. A-62a).

The undisputed facts of the case established that in determining the level of required police protection, "[t]he city based its decision on a number of factors including its belief that due to the controversial nature of the rally and the location of the Martin Marietta plant, a major defense manufacturer and a large local employer in Orlando, the potential for hostile counter activity existed which necessitated the need for additional police protection." (Pet. App. A-12a-13a).

The Court of Appeals held, *inter alia*:

> Moreover, to the extent that the fees charged to the Central Florida Nuclear Freeze Campaign were based upon the content of the

demonstrator's views, the City of Orlando charged the organizers of the march and rally for the enjoyment of a right guaranteed by the Federal Constitution.

* * *

The deputy chief of police, Frederick Walsh, testified in his deposition that the Nuclear Freeze Campaign permit costs included subjective considerations of police protection from hostile counter activity and the presence of out-of-town demonstrators.

* * *

The effect of the Orlando ordinance, as applied in the case at hand, is to charge more for First Amendment activity which may require more police protection than less controversial speech; such a result places an undue burden on speech which is constitutionally unacceptable.

(Pet. App. A-49a; 52a-53a; 55a).

Thus, contrary to the Petitioner's broadly stated view of this case as an example of unresolved tensions between the First Amendment and local government financing, the decision below also presents a much narrower *ratio decidendi* which counsels against certiorari.

SUMMARY OF ARGUMENT

The decision below does not present an important unanswered question, nor does it conflict with any decisions of this Court.

One basis for the decision was that the charges imposed for police services required payment to protect the Petitioners from hostile counter activity. A long line of cases condemns limiting First Amendment rights because of the threat of hostile demonstrators. Since "this Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' ", *Kremens v. Bartley*, 431 U.S. 119,136 (1977), quoting *Liverpool, N.Y. & P.S.S. Co. v. Emmigration Comm'rs*, 113 U.S. 33,39 (1885), and since on this record a basis for the decision below is in complete accord with established constitutional principles, the Petitioner's suggestion that certiorari be granted to revisit *Cox v. New Hampshire*, 312 U.S. 569 (1941), should be declined.

THE REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

The Petitioner's strongest contention is that since the 1941 Cox decision "there has been no clarification from this Court on the issue of fees for police services." Pet. at 21.

If this case squarely presented the need to evaluate *Cox* in light of later First Amendment law, opposing certiorari would be difficult.

But the decision below also presents a much narrower constitutional basis for its decision: the impropriety of forcing demonstrators to pay to be protected from hostile counter activity. That constitutional holding is neither new nor novel. Since "this Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' ", *Kremens v. Bartley*, 431 U.S. 119,136 (1977), quoting *Liverpool, N.Y. & P.S.S. Co. v. Emmigration Comm'rs*, 113 U.S. 33,39 (1885), the decisional law which determines the outcome of this case compels the conclusion that the opinion below does not conflict with the holdings of this Court, nor does it present any important, unanswered question meriting certiorari review.

Numerous cases protect the exercise of First Amendment rights from "hecklers' vetoes." The cases have helpfully been collected by Professor Neisser in *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo.L.J. 257, 288 n.166 (1986):

> *See*, Coates v. Cincinnati, 402 U.S. 611 615-16 (1971) (state may not punish citizens for engaging in public gathering "annoying" to others); Bachellar v. Maryland, 397 U.S. 564, 567 (1970) (state cannot punish Vietnam protestors because of "resentment" of onlookers); Gregory v. City of Chicago, 394 U.S. 111, 117 (1969) (disorderly conduct conviction cannot stand when defendant acted in "orderly manner in public protest" but surrounding crowd became hostile), Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966) (plurality opinion) ("participants in an orderly

demonstration in a public place are not chargeable with danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence"); Cox v. Louisiana, 379 U.S. 536, 550 (1965) (reversing breach of peace conviction where 1500 demonstrators separated by 75 to 80 police from 100 to 300 "muttering" spectators); Watson v. City of Memphis, 373 U.S. 526, 635 (1963) (reversing order granting city six months to develop desegregation plan for city parks where basis for delay was potential violence); Wright v. Georgia, 373 U.S. 284, 292-93 (1963) (reversing breach of peace convictions of blacks playing basketball in whites-only park on due process grounds, in part because conviction based on likelihood of breach of peace by others); Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (reversing breach of peace conviction of 200 peaceful demonstrators at State House where onlookers had become unruly and threatened disruption). . . .

The Petitioner's deposition testimony, quoted by the Court of Appeals, reveals the economic "heckler's veto" imposed here:

Q. The question I have is why must the demonstrators pay for protection of the rights that it is your job to guarantee?

A. It has been our position on that issue that were it not for this particular

> demonstration, then the cost—the cost factor, which it boils down to an amount of dollars here, that the City would have expended would no longer be necessary. In other words, if the exercise—if the 18A permit were not granted and whatever happens there with that 18A permit didn't happen, then there would be no potential for a violation of rights or for disorder or anything else, you see. So the reason that the potential exists is because of the events that is happening. So the question then becomes one of should the taxpayer out of the tax base, the general fund which subsidizes police service to perform a certain function here in city be—absorb that or should it be absorbed by the people that are actually in the process of exercising their rights.
>
> (Pet. App. A-82a-83a).

In *Hague v. CIO*, 307 U.S. 496 (1939), the Court condemned an ordinance allowing First Amendment rights to be denied in order to prevent "riots, disturbances or disorderly assemblage", because such ordinances can

> . . . be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly "prevent" such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the

duty to maintain order in connection with the exercise of the right.

Id., at 516.

The Respondents were exercising clearly protected constitutional rights. By charging for police services based upon anticipated "hostile counter activity", the Petitioner charged them "for the enjoyment of a right granted by the Federal Constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). No case stands for the proposition that demonstrators must pay the police to protect their First Amendment rights from mob violence. Indeed, the cases all counsel the opposite result.[1]

Cox v. New Hampshire need not be reviewed upon the facts of this case. The Petitioner's claim that "the lower courts are sorely in need of this Court's guidance [regarding the continued viability of Cox]", Pet. at 21, is unfounded. The Petitioner supports his claim with a single unreported "directly on point" case, *Stonewall Union v. City of Columbus*, (U.S.D.C. E.D. Ohio, 1985), which is reproduced in the Appendix (Pet. App. F-136a). The District Court in *Stonewall* found: "on the present state of the record, there has been no showing that the assessment of costs for traffic control is in any way content based or that it is applied in a discriminatory manner. . . ." (Pet. App. F-160a.)

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[1]By assessing provocativeness and charging for it, the City also contravened the principle that government may not restrain speech on the basis of its content. *See, City of Renton v. Playtime Theatres, Inc.* ____ U.S. ____, 54 L.W. 4160, 4161-62 (February 25, 1986).

The Court of Appeals in this case found the record supportive of content discrimination. (Pet. App. A-43a.) Perhaps *Stonewall*, which is apparently in the Sixth Circuit (Pet. at 22), will present important unanswered and unavoidable questions about *Cox*. This case does not do so. Therefore certiorari should not be granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true copies of the foregoing "Brief in Opposition to Certiorari" have been furnished by U.S.Mail to JODY M. LITCHFORD, Assistant City Attorney, P. O. Box 913, Orlando, Florida 32802, pursuant to Rule 28.3 of this Court, this _____ day of March, 1986.

_____

BRUCE ROGOW